No. 88-1134

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR F. SANTRY, JR., and FG DOE, EN ROE and JB LOE,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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47pp

I.

QUESTIONS PRESENTED FOR REVIEW

1. When an established firm, without patents, trademarks, copyrights or bona fide trade secrets to support a civil action in federal or state court, with assistance of present employees and in conspiracy with others, chooses to deal with relevant market competition using state law criminal search warrant processes and state trade secret felony theft law against a fledgling firm founded by a former employee:[1] is an unlawful search and seizure by a present employee and outsiders shielded from federal and state civil rights law review by a one-year time bar; and, is conspiratorial anticompetitive and monopolistic conduct shielded from federal antitrust law review by the *Noerr-Pennington* doctrine?

2. Which common law tort—"abuse of process" or "malicious prosecution"[2] shall be used for a federal court case where a former employee alleges many material facts as to multifaceted conspiracies creating Sherman Act violations by an established firm, and the facts include a prior prosecution of the former employee in state court under state trade secret felony theft law, and the defense summarily pleaded for the established firm against the antitrust claims is an immunity from suit derived from the *Noerr-Pennington* doctrine because "the defendants resorted to the courts."?[3]

3. Would the answer by the Court to Question 2 be any different: (a) if the prior prosecution of the former employee in state court on a felony charge never went to

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[1] The comparative terms "established firm," "fledgling firm," and "former employee" are credited to the authority *Antitrust Remedies For A Former Employee Sued For Trade Secret Misappropriation*," Pet. App. A145 at 151.

[2] Petitioners cite authority for common law definition of the tort of abuse of process in the appendix herefor: Pet. App. A141-142.

[3] Decision, Court of Appeals, filed August 24, 1988: Pet. App. A7.

trial; (b) if the prior prosecution after two years pendency obtained a guilty plea from the former employee to a misdemeanor charge of receiving stolen property having a value less than $150.00; (c) if plea bargain arrangements underlying the guilty plea provided for substantial payment as restitution to the established firm as well as parole under state court supervision but with no time in the county jail; (d) if the payment as restitution was traded for a covenant from the former employee not to compete for an additional three years; and, (e) if the record of conviction of the former employee because of the guilty plea was expunged by the state court after filing of the federal court case?

LIST OF PARTIES

There are no parties not named in the caption.

RULE 28.1 STATEMENT

Western Reserve Group, Inc. is identified in the Complaint ¶4a: Pet. App. A110. Petitioner Western Reserve Group, Inc. is no longer doing business as an Ohio Corporation.

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To the United States Court of Appeals
For the Sixth Circuit

REFERENCE TO THE OPINIONS IN THE COURTS BELOW

By a decision filed August 24, 1988, issued as mandate, October 26, 1988, the Court of Appeals for the Sixth Circuit concludes: "The judgment of the district court is affirmed." This decision has been stamped by the court clerk "Not Recommended For Full-Text Publication."

None of the opinions in the District Court have been designated for publication.

In accord with Supreme Court rule, the separate appendix herefor contains the decision filed August 24, 1988, Appeals No. 87-3378 and No. 87-3657: Pet. App. A1-8.[4] This decision is informally reported at ¶68,224, *CCH Tr. Reg. Rep.* 9-27-88.

The seriatim pretrial orders, opinions, and judgment entries of the District Court, thirteen (13) writings from January 3, 1986 until July 24, 1987, are in the separate appendix herefor in chronological sequence, first to last. These writings were:

> Order limiting discovery by petitioners pursuant to Fed.R.Civ.P. 26(c), prepared by Cleveland counsel for Combustion Engineering respondents, last sentence handwritten by the District Court, filed January 3, 1986: Pet. App. A9-10.
>
> Memorandum Opinion filed February 19, 1986: Pet. App. A11-21.
>
> Judgment Entry filed February 19, 1986, dismissing civil rights Count I against Combustion Engineering respondents: Pet. App. A22.
>
> Order filed July 29, 1986, denying reconsideration of dismissal of civil rights Count I against Combustion Engineering respondents: Pet. App. A23-25.

[4] The statement of issues presented for review in Appeals No. 87-3378 and No. 87-3657 are in the appendix herefor: Pet. App. A57 and A58.

Memorandum Opinion filed January 21, 1987: Pet. App. A26-30.

Judgment Entry filed January 21, 1987, dismissing antitrust Counts II and III against Combustion Engineering respondents: Pet. App. A31.

Memorandum Opinion filed March 24, 1987: Pet. App. A32-33.

Judgment Entry filed March 24, 1987, dismissing civil rights Count I against respondent Hubbell: Pet. App. A34.

Order filed March 24, 1987, denying reconsideration of dismissal of antitrust Counts II and III against Combustion Engineering respondents: Pet. App. A35-37.

Sua Sponte Order filed March 24, 1987, for dismissal of antitrust Counts II and III against respondent Hubbell: Pet. App. A38.

Memorandum Opinion filed June 10, 1987: Pet. App. A39-41.

Judgment Entry filed June 10, 1987, dismissing antitrust Counts II and III against respondent Hubbell: Pet. App. A42.

Order filed July 24, 1987, requested by the Combustion Engineering respondents, denying relief from judgment as to dismissal of antitrust Counts II and III against respondent Hubbell: Pet. App. A43-45.[5]

The Clerk's Order for the Court of Appeals denying a petition for rehearing and suggestion for rehearing en banc was filed October 12, 1988: Pet. App. A46.[6]

[5] The state court Judgment of Expungement of the conviction of petitioner Smith on the misdemeanor charge of receiving stolen property having a value less than $150.00, referenced in the Order filed July 24, 1987, is dated May 18, 1987: plaintiffs' Exhibit 300, Pet. App. A59-61.

[6] The submission by petitioners to the Court of Appeals prior to October 12, 1988 is in the appendix herefor: Pet. App. A62-77.

For this case, the petitioners had to lodge three appeals with the Court of Appeals: Appeals No. 87-3378, No. 87-3657, and No. 87-3761.[7] The appeals were consolidated by administrative order on motion of respondent Hubbell, who also was granted leave to adopt any brief of the Combustion Engineering respondents for the second Appeal No. 87-*3657*. The Clerk's Order was filed November 9, 1987: Pet. App. A48.

An Order of the Court of Appeals filed April 11, 1988, dismissed Appeal No. 87-3761 "for lack of appellate jurisdiction": Pet. App. A49-52. This order has been stamped by the court clerk "Not Recommended For Full-Text Publication".

The Calendar Coordinator, Court of Appeals, by letter dated May 26, 1988, set the date for oral argument of Appeals No. 87-3378 and No. 87-3657, with leave to file update citations[8]: Pet. App. A53-54.

A Clerk's Order for the Court of Appeals filed June 9, 1988, denied petitioners' request for time beyond fifteen minutes, after respondents' opposition, for oral argument of Appeals No. 87-3378 and No. 87-3657: Pet. App. A55.

Another Clerk's Order for the Court of Appeals was filed July 27, 1988: Pet. App. A56. This Order created uncertainty as to the argument weight of the letter dated July 1, 1988, from petitioners' counsel. See, footnote 8. The opinion from the panel makes mention of only one update citation: Pet. App. A7.

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[7] The statement of issues presented for review in Appeal No. 87-3761, is in the appendix herefor: Pet. App. A79.

[8] A long letter with update citations on the stationery of petitioners' counsel Cook & Cook, dated July 1, 1988, to Office of the Clerk, Sixth Circuit Court of Appeals, is in the Appendix herefor: Pet. App. A80-101.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The judgment of the Court of Appeals was entered on August 24, 1988. The order denying the petition for rehearing and suggestion for rehearing en banc was filed on October 12, 1988. The statute which confirms jurisdiction on the Court to review the judgment in question is 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED FOR PETITIONERS' CASE

Each will be cited next below in relevant context to the format of petitioners' entire Complaint. In accord with Supreme Court Rule 21.1.(f), their pertinent text is printed in the Appendix herefor, following comment thereon and citation thereof.

Petitioners alleged subject matter jurisdiction in Complaint ¶1. Pet. App. A108.

Petitioners alleged four year statute of limitations for the action in Complaint ¶2: Pet. App. A109, in accordance with Title 15 U.S.C. §15b and Ohio Revised Code §2305.09: Pet. App. A134 and A135.

Petitioners' *FIRST COUNT* ¶¶34-45 and ¶¶78-80: Pet. App. A116-119 and A130-131, supported by ¶¶3-17 [ALLEGATIONS AS TO THE PARTIES]: Pet. App. A109-112 and ¶¶18-33 [ALLEGATIONS COMMON TO ALL COUNTS]: Pet. App. A112-116, was dismissed in its entirety on the basis of automatic retroactive application of the one year time bar *Rule* judicially created by the Court of Appeals in *Mulligan v. Hazard,* 777 F.2d 340 (CA6 1985).

The United States Constitutional provision applicable to the *FIRST COUNT* is Amendment 4: Pet. App. A135.

The Ohio Constitutional provisions applicable to the *FIRST COUNT* are Article I, §1 *Inalienable Rights* and Article 1, §14 *Search Warrants:* Pet. App. A136.

Title 42 U.S.C. §1983, applied to the second claim in ¶¶35-43 of the *FIRST COUNT* (Pet. App. A116-118), is printed at Pet. App. A136.

The third claim in the *FIRST COUNT*, ¶44 (Pet. App. A118), is predicated upon assertion of the civil rights action provisions of Title 42 U.S.C. §1988: Pet. App. A137.

An allegation common to *all COUNTS*, Complaint ¶24 (Pet. App. A113), asserts that the investigation by Niam Investigations of the business activities of petitioners was a licensed activity under color of state law. The applicable state law, Ohio Revised Code §4749.01, is printed at Pet. App. A138.

The *FIRST COUNT* relies upon common law definitions of tortious conduct and acts in concert or conspiracy with persons acting under color of state law. Such conduct and acts involve a trespass upon real property owned by petitioner Smith, a taking and detaining of personal property owned by both petitioners, and an injury to civil rights of both petitioners. Prosser, *Handbook of The Law of Torts*, is submitted in pertinent text excerpts as a definitional source for state common law on the torts of trespass to land, trespass to chattels and conversion: Pet. App. A139-141.

The Appendix herefor next prints an excerpt from Professor Prosser applicable to the common law underlying the *SECOND* and *THIRD COUNTS* (Pet. App. A119-122 and A122-127), setting forth the known and accepted difference between "abuse of process"[9] and "malicious prosecution": Pet. App. A141-142.

[9] In the Memorandum Opinion filed January 21, 1987 (Pet. App. A29-30), the District Court said—

> Plaintiffs' claim of abuse of process and the application of the sham exception to the *Noerr-Pennington* doctrine raises more difficult questions. Although normally such issues could only be resolved at trial, the Court feels that in the context of the unique factual background of this case, these questions do not raise an issue of material fact. * * *

The *SECOND* and *THIRD COUNTS* are based, in the alternative awaiting the proofs at trial, on 15 U.S.C. §1 and 15 U.S.C. §2: Pet. App. A142.

The petitioners' amendments to the *FIRST COUNT* ¶¶78-80 (Pet. App. A130-131), based upon post-filing discovery of documents from the files of Niam Investigation generally aver as to petitioner Smith's condition or state of mind prior to and on January 13, 1984. These allegations are in accord with Fed.R.Civ.P., Rule 9(b): Pet. App. A143.

Complaint ¶69 (Pet. App. A124) alleges that petitioner Smith was discharged by his full time employer on January 13, 1982, the date petitioner Smith was indicted by the state court Grand Jury. Although not specifically pleaded in the original Complaint, subsequent discovery depositions of respondent Kavanagh and private investigator Edward Niam filed with the clerk of the District Court could lead to a jury verdict that Kavanagh and Niam conspired with assistant county prosecutor Gasper to advise Richard R. Edminster, Esq., general counsel for the then current employer of petitioner Smith, about the pending indictment by the Grand Jury. Such conduct, if proven at trial, could be in violation of Ohio Revised Code §2939.18: Pet. App. A143.

Complaint ¶70 (Pet. App. A124) references Ohio Revised Code §2939.10 and §2939.20: Pet. App. A143-144. Discovery depositions filed with the clerk of the District Court, such as those of respondent Kavanagh and private investigator Edward Niam, could lead to admissible evidence for support of a jury verdict finding a violation of privacy of the Grand Jury contrary to Ohio Revised Code §2939.10 or §2939.18: Pet. App. A143.

STATEMENT OF THE CASE

The material facts of this case were operative from 1970 until March 24, 1987 as between adversary parties to this civil litigation. Also, the date facts as to the state and federal courts below overlap. The criminal proceeding in a Northeastern Ohio state court lasted from arraignment and plea of not guilty on February 22, 1982 to a judgment of expungement of conviction May 18, 1987. The pretrial civil case in a Northeastern Ohio district court was pending from November 18, 1985 until July 24, 1987. Three consecutive appeals to the Sixth Circuit began April 20, 1987 and were exhausted on October 12, 1988.

The material facts cannot all be drawn from part I of the opinion of the Court of Appeals filed August 24, 1988: Pet. App. A2-3. The writer may have condensed his facts from abridged facts found by the District Court in its Background statement for the first Memorandum Opinion filed February 19, 1986: Pet. App. A12-15.

In both courts below, the decisions made to favor all respondents key on two undisputed facts: *Fact 1,* a search and seizure by private persons at the home of petitioner Smith on December 8, 1981 without any official involvement by a state prosecutor or prosecutor's office; *Fact 2,* an alleged coerced plea bargain guilty plea to a lesser offense of receiving stolen property of a value less than $150.00 on January 13, 1984.

The original complaint filed November 18, 1985, ¶¶1-77, Pet. App. A108-129, alleged facts which are subject to proof at jury trial, with only minor amendments before trial.[10]

[10] Complaint ¶28 (Pet. App. A114) would be amended to read, "At *several times* prior to December 7, 1981, several identical *drafts of* affidavits were prepared *with the advice of counsel* for the signature of defendant Edwin M. Kavanagh: Said affidavits being based solely or completely based upon information conveyed to or provided *to* defendant Edwin M. Kavanagh *by counsel and by defendant Lawrence K. Hubbell* and *by* a person from said Niam Investigations." This proposed amendment is based upon discovered documents and deposition testimony taken from March 11, 1986 until June 3, 1986, and filed with the clerk of the District Court October 22, 1986.

The amended Complaint with ¶¶78-80, Pet App. A130-131, was submitted to the District Court, with exhibits in support, and a request for leave to file on January 23, 1986. The District Court permitted formal filing July 22, 1986. The exhibits in support included two "smoking gun" letters obtained by petitioners' discovery from the office files of Niam Investigation and addressed to respondents Kelley and Roche. These two letters, and six other letters exchanged between conspirators during days in 1984 following the conviction of petitioner Smith in the state court, are in the Appendix herefor: Pet. App. A162-173.

It is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.[11]

Petitioner Smith came to present counsel in the early fall of 1985. He came as a former employee, as a former Vice President and General Manager of an established firm, respondent C-E Cast Equipment. He was able to supply a business biography to support the Complaint ¶¶3(a)-(f) (Pet. App. A109-110) and define the relevant market for the antitrust claim in the *THIRD COUNT* by Complaint ¶62: Pet. App. A122.

When petitioner Smith came to counsel in 1985, he had no records (other than IRS and state tax returns retained by his accountant) relating to the business of Western Reserve Group, Inc. He explained that all business records relating to his company had been searched for and seized, taken away and never returned, the morning of December 8, 1981. He further explained that the office of his company was in the basement of his residence.

Petitioner Smith gave present counsel all the documents which he had preserved for almost four years. He did have a complete transcript and exhibits of the

[11] *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974).

pretrial phase of his state court criminal prosecution for trade secret felony theft from the corporate respondents.[12]

He also had a collection of newspaper and trade journal clippings and a VCR tape which were background for the "extensive media reporting and coverage" allegations in Complaint ¶33: Pet. App. A115-116. He also had a trade show type brochure which was used to prepare the relevant market and actual market definitions for the antitrust claim in the *SECOND COUNT,* Complaint ¶¶51 and 52: Pet. App. A120.

Upon reading the 822 page transcript and reviewing the 50 document exhibits, present counsel for petitioners determined that a common nucleus of operative facts would support two distinct but interwoven claims—civil rights and antitrust. Counsel engaged in a thought process, which may be defined by a precedent from the Court as an "evaluation of the characteristics of those claims relevant to the realistic life expectancy of the evidence and the adversary's reasonable expectations of repose." *Wilson v. Garcia,* 471 U.S. 261, at 282 (1985), O'Connor. *J.,* dissent.

The available 822 page transcript showed that concealed anticompetitive conduct by the respondents began in July, 1981, and did not surface until December 8, 1981. Then, petitioner Smith knew, by the search and

[12] Petitioner Smith was indicted by the Cuyahoga County, Ohio Grand Jury, January 13, 1982; was arraigned and pleaded not guilty on February 22, 1982, and retained a Cuyahoga County counsel for his defense. His counsel presented to the state court a timely filed motion to dismiss the indictments for good cause shown. From October 7, 1982 through December 20, 1982, the state court heard testimony and received evidence as to trade secret theft. The state court presided over eight hearings. The testimony of petitioner Smith and nine other witnesses, including respondents Kavanagh and Roche, was recorded in a transcript of 822 pages with about 50 document exhibits. During the next year, 1983, requests by petitioner Smith for speedy trial notwithstanding, the state court did nothing with the criminal case. Except for the expungement state law criminal process occurring after filing of the Complaint for petitioners' case, the relevant dates and events relating to use of state trade secret felony theft law by respondents against petitioners are pleaded with specificity in the Complaint. E.g., ¶¶70-76: Pet. App. A124-127.

seizure, that he and petitioner Western Reserve Group, Inc. were the target for anticompetitive conduct by respondents.

For the period December 8, 1981 until January 13, 1982, information from the recollection of petitioner Smith about the actions of the Combustion Engineering respondents in retaining the business records of petitioner Western Reserve Group, Inc. and the adverse publicity in the TV and print media about the business character of both petitioners, lead petitioners' counsel to conclude that monopoly power had been created for respondents against the new competition generated in a relevant market by petitioners.

In an ultimate sense, the respondents and non-party defendants in this case are businesses, businessmen or persons who routinely retain business records. Sufficient pretrial discovery has gone on before so that petitioners' case is ready for prima facia presentation at trial; except for limited additional discovery going to the amount or extent of damage to petitioners. Many, many documents corroborating complaint allegations have been discovered by petitioners. Eight documents involving the private investigator Niam and several individual respondents have been referred to above, at page 8. Still another document, originated by respondent Hubbell and sent to a management person of respondent C-E Cast Equipment, a letter document dated January 29, 1986 and requesting a payment of legal fees for defending this case because of participation in the investigation of petitioners, is in the Appendix herefor: Pet. App. A174-175.

Upon learning in 1981 that its customers were buying from an unknown competitor, the Combustion Engineering respondent acted as follows after an internal investigation:

(a) They hired a zealous private investigator;

(b) They identified and suborned a supplier to the petitioners, respondent Hubbell;

(c) They retained a prominent Cleveland law firm, Arter & Hadden;

(d) They requested respondent McGranahan to give a sworn statement to the law firm about conversations and a meeting with petitioner Smith in October, 1978;

(e) They encouraged respondent Kavanagh and the private investigator to seek out a county prosecutor;

(f) They asked assistance from the law firm to prepare an affidavit for respondent Kavanagh which was executed to obtain a search warrant in Summit County even though petitioner Smith was later indicted in Cuyahoga County;

(g) They had made a search and seizure at the home of petitioner Smith and office of petitioner Western Reserve Group, Inc. by private persons, respondent Fisher, investigator Niam and Niam's secretary on December 8, 1981;

(h) They had someone arrange for extensive newspaper and TV media coverage during and after the search of petitioners' home and office;

(i) After the search and seizure, and before petitioner Smith was indicted, they had the county prosecutor speak with general counsel for a present employer of petitioner Smith who was thereafter discharged from that full-time employment;

(j) They arranged weeks later after the search and seizure at petitioner Smith's home for the county prosecutor to seek an indictment of petitioner Smith on a felony charge of trade secret theft using Grand Jury testimony of respondent Kavanagh. Respondent Kavanagh gave his

testimony using a large drawing prepared at the office of respondent C-E Cast Equipment to show the business plans of petitioner Western Reserve Group, Inc. Respondent Kavanagh had prepared a 24" x 36" drawing showing the business organization, the customers and, the engineering drawings used by Western Reserve Group, Inc. to order products from its suppliers. The Kavanagh drawing also highlights as key personnel—Arter & Hadden, the Cuyahoga County Prosecutor and Edward Niam Investigations. The drawing was filed with the clerk of the District Court and shown to the Court of Appeals at oral argument as plaintiffs' Exhibit 12.[13]

(k) They promoted protraction and delay in the state court prosecution of petitioner Smith for two years;

(l) They agreed to ending of the state court prosecution if petitioner Smith would plead guilty to a misdemeanor charge and would pay restitution to the corporate respondents;

(m) They agreed to cancel a promissory note from petitioner Smith executed as restitution if petitioner Smith would give a noncompetitive covenant for an additional three years.

BASIS OF JURISDICTION IN THE U.S. DISTRICT COURT

15 U.S.C. §22; 28 U.S.C. §§1331, 1332 and 1343: Pet. App. A133-134.

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[13] Exhibit 12 is further referenced in the Appendix herefor: Pet. App. A176. Information on the face of Exhibit 12 was compiled: from discarded envelopes taken by investigator Niam during a search of petitioner Smith's garbage, Complaint ¶22: Pet. App. A113; using information freely provided by respondent Hubbell, Complaint ¶25: Pet. App. A114; using information seized and taken away from petitioner Smith on December 8, 1981, Complaint ¶32: Pet. App. A115; and information from internal documents in the files of respondent C-E Cast Equipment.

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT

The interwoven issues of federal and state law presented by the facts of this case have been denied the light of a federal district courtroom and plenary trial with facts found by a jury. The facts of this case present questions of Fourth Amendment and Ohio Constitution guarantees, civil rights and liberties and Sherman Act wrongs: versus, multifaceted conspiracies and anticompetitive actions to the detriment of the process of fair market competition. The courts below have tried to provide an established firm facing competition in a relevant market from a fledgling firm founded by a former employee with absolute immunities from suit against anticompetitive conduct.

The present need of the antitrust bar and federal judges below to know the thinking of the Court about the interwoven issues of state and federal law here presented is exemplified by the ABA/Section of Litigation unpublished paper, Mannino, E.F., *Antitrust Remedies For A Former Employee Sued for Trade Secret Misappropriation:* Pet. App. A145-155. This paper is not a scholarly treatise; there is no theorem and there is no offered solution. The reported cases methodically indexed show that the Supreme Court has not spoken to the broad questions posed by current case law, perhaps, since 1977.

There is confusion and uncertainty as to what can and cannot be done when an established firm, a "big business", asserts claims for trade secret misappropriation against a former employee and his fledgling firm, a "small business":

> ". . ., new and small-to-midsized firms have provided this bulk of the twenty million new jobs created in the past decade." *U.S. News & World Report,* Dec. 26, 1988/Jan. 2, 1989 p. 124.

If the ultimate decision below is permitted to stand as law of the Sixth Circuit, injustice in the free enterprise system will become the norm. Such result is

regrettable; particularly for those who believe that patents, trademarks, copyrights, and bona fide trade secrets are the only monopolies for lawful assertion against emerging and successful competition. The respondents' patterns of conduct in this case should not become an acceptable rule of law, even in Sixth Circuit, for doing business in this country.

The Affirmed Dismissal Of The First Count, Which Included A Distinct Claim Based Upon Section 1983, On The Basis Of The One-Year Time Bar Created For All Cases Filed In Ohio Federal District Courts By Automatic Retroactive Application Of A Circuit Precedent Created By *Mulligan v. Hazard,* Was Wrong.

The decision by a panel of the Court of Appeals in *Mulligan v. Hazard,* 777 F.2d 340 (CA6 1985), *cert. denied* 476 U.S. 1174 (1986), was announced as precedent January 7, 1986. The Complaint filed by petitioners November 18, 1985, had a designated *FIRST COUNT,* ¶¶34-45: Pet. App. A116-119.

The *FIRST COUNT* was based on events known to have taken place on December 8, 1981. There was a trespass to land during an unlawful search. There was a trespass to chattels or conversion by an unlawful seizure.[14] There was an exercise of unlawful authority over the property of petitioners by private persons, respondent Fisher, investigator Niam and Niam's secretary, during the search and seizure.

The *FIRST COUNT* facts give rise to a set of three claims based on violations of guaranteed liberties: A state law claim in ¶34; a federal law claim under 42 U.S.C. §1983, ¶35; and a second federal law claim under 42 U.S.C. §1988 and based upon the Constitution and common law of the State of Ohio.

The realistic statute of limitations, a four-year time bar matching all of the claims in the *FIRST COUNT* is

[14] Petitioners cite authority for common law definitions of the torts trespass to land, trespass to chattels, and conversion, in the Appendix herefor: Pet. App. A139-141.

Ohio Revised Code Section 2305.09, Pet. App. A135, specifically pleaded by Complaint ¶2: Pet. App. A109.[15]

Gaff v. Federal Deposit Ins. Corp., et al., 828 F.2d 1145 (CA6 1987) is a current circuit precedent wherein a panel of the Court of Appeals held that separate claims in a Count must each be evaluated and "fully addressed", before a dismissal of the entire Count may be reviewed on appeal. *Id.*, at 1151.

The recent authority of *Gaff* was both cited and argued to the Court of Appeals just prior to oral argument: Pet. App. A89-91. After the decision filed August 24, 1988, Pet. App. A1-8, by a panel which did not accept the precedent of *Gaff*, the Court of Appeals was asked to rehear *En Banc* Question I, Pet. App. A63, in light of petitioners' rehearing argument for applying *Gaff*: Pet. App. A67.[16]

The panel of the Court of Appeals affirming the dismissal of the *FIRST COUNT* in its entirety neither accepted nor applied a mandate from the summary order of the Court in *Vodila v. Clelland*, _____ U.S. _____, 107 S.Ct. 3255, 97 L.Ed.2d 754 (1987). This decision was cited and argued to the Court of Appeals just prior to oral argument: Pet. App. A84-85.

After the decision filed August 24, 1988, which does not acknowledge any authority other than *Wilson v. Garcia, supra*, and *Mulligan v. Hazard, supra*, see, Pet. App. A4, the Court of Appeals was asked to rehear *En Banc* Question II, Pet. App. A63, in light of petitioners' rehearing argument for recognizing the authority of *Vodila v. Clelland:* Pet. App. A67-69.

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[15] The pragmatic result of the courts below applying a one-year statute of limitation was a compulsory amendment, without evidentiary hearing, of petitioners' Complaint ¶2.

[16] The question of applicability of *Gaff* against blanket dismissal of *all claims* in the *FIRST COUNT* by retroactive application of *Mulligan v. Hazard, supra*, was expressly preserved for review by this Court: Pet. App. A67.

Prior to the decision by one panel of the Court of Appeals, filed August 24, 1988, two other panels (Judges Engel, Krupansky[17] and Guy and Judges Keith, Nelson and Boggs) had earlier accepted the authority of *Vodila v. Clelland, supra.*

The first decision was *Thomas v. Shipka* (II), 829 F.2d 570 (CA6 1987). The second decision was *Vodila v. Clelland* (II), 836 F.2d 231 (CA6 1987).

The panel in *Thomas* recognized that "[o]n June 26, 1987, the Supreme Court issued a summary order vacating the judgment of this court in *Vodila v. Clelland,* 802 F.2d 460, ... remanding the case for further consideration ...." *Id.,* at 572. The panel interpreted the *Vodila* mandate as leading to a conclusion of law that the decision in *Mulligan* "represented a departure from clear precedent which had established a longer period of limitations for §1983 claims filed in Ohio." *Id.*, at 573.

When the panel for *Vodila* took up the mandate from the Court, they had no difficulty in finding a conclusion of law:

> The Supreme Court's action, as our court recently had occasion to observe in another case, "compels the conclusion that the one-year statute of limitations adopted in *Mulligan* for all §1983 claims brought in Ohio is *not* to be automatically applied retroactively and that the decision as to retroactivity must be made on a case-by-case basis." (836 F.2d, at 232).

The *Vodila* panel refined the mandate of the Court, considered the panel decision in *Thomas,* and established a rule of law calling for a showing by a plaintiff-appellant of "clear past precedent" or "clear circuit precedent" of stature sufficient to offset automatic retroactive application of the one-year time bar promulgated for Ohio cases by *Mulligan v. Hazard, supra, Id.,* at 232-233.

[17] Petitioners' signatory counsel observes that Circuit Judge Robert B. Krupansky, Cleveland, Ohio, also was a member of the panel (together with Judges Lively and Merritt) who rendered the Court of Appeals decision for which review is sought.

The petitioners offered a citation of nine clear past precedents prior to December 8, 1982, one year after the search and seizure, to the Court of Appeals on two occasions. First, was just prior to oral argument: Pet. App. A87-89. Second, after the composition of the panel was known, by the submission for rehearing and suggestion for rehearing *En Banc:* Pet. App. A69-71. For whatever the reason, it is clear that the panel of the Court of Appeals rendering the decision of August 24, 1988, shows almost a wooden determination to not lift the immunity of a one-year time bar granted to respondents by the District Court. The action by a later panel goes against the action of two earlier panels and is wrong, on the merits, and is of sufficient importance as to warrant exercise of this Court's power of supervision.

A Statute Of Limitations For A Section 1983 Case Awaiting Published Decision By The Court.

Owens v. Okure, No. 87-56, *cert. granted* March 22, 1988, was argued to the Court November 1, 1988 (57 U.S.L.W. 3359) and in the time available for preparation of this petition for writ of certiorari has not been decided.

Okure v. Owens, 816 F.2d 45 (CA2 1987) and *Owens v. Okure,* No. 87-56, were both cited and argued to the Court of Appeals just prior to oral argument: Pet. App. A93-95.[18]

The Failure Of The Courts Below To Deny Or Limit An Extension Of The Noerr-Pennington Doctrine Is Wrong In Light Of Two Recent Decisions By The Court.

On two occasions, the Court of Appeals was asked to consider respondents' immunity defense under the *Noerr-Pennington* doctrine because of *Patrick*

[18] Petitioners' signatory counsel knows that predicting for a court of appeals what the Supreme Court of the United States will decide for a given case is a very, very "dangerous game". Such predictions may be justified in the extreme case, as here, where a judgment of a district court should not be affirmed by a court of appeals.

v. Burget, 486 U.S. _____, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. _____, 108 S.Ct. 1931, 100 L.Ed.2d 497.

The first time was just prior to oral argument: Pet. App. A97-99.[19] The second time, after the panel decision filed August 24, 1988, Pet. App. A62, 63, 71-75. The panel decision by the Court of Appeals does not acknowledge *Patrick v. Burget, supra.* The panel opinion concluded—

> "*Allied Tube* does not speak to the present case, where the defendants resorted to the courts." Pet. App. A7.

The Court should say for the edification of Sixth Circuit what was meant by *Patrick* and *Allied Tube.*

The Courts Below Were Wrong In Refusing To See That The Tort Of "Abuse Of Process", Not "Malicious Prosecution", Was The Appropriate Objective Test For Evaluating Respondents' Conduct In Resorting To State Court Prosecution Until Petitioners Pled Guilty.

Petitioner Smith was indicted January 13, 1982, arraigned and pled not guilty on February 22, 1982, and eventually became the subject of a plea bargain agreement requiring his plea of guilty nearly two years later on January 13, 1984.

The District Court denied petitioners' contention that respondents' conduct came within the "sham exception" to the *Noerr-Pennington* doctrine. Petitioners' argument was rejected because both courts below adopted language from a circuit precedent, *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568 (CA6 1986) to support a holding "that the defendants could not be found to have fostered a baseless prosecution since they prevailed in their position when the plaintiffs plead guilty." Court of Appeals decision filed August 24, 1988: Pet. App. A7.

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[19] The letter for petitioners, filed July 1, 1988, reacquainted the Court of Appeals with the fact that petitioner had cited and argued at length in a brief for Appeal No. 87-3657 *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (CA2 1987) Pet. App. A98.

Petitioners argued for Appeal No. 87-3378 (blue cover Brief at pg. 13), that the District Court's reliance on *Potters Medical* exhibits a misinterpretation of the tort of abuse of process. "The fact that [respondents'] position prevailed does not require a finding that [petitioners'] claim of abuse of process must fail. Unlike cases involving a claim of malicious prosecution, termination of the criminal litigation in favor of [petitioners] is not a prerequisite to a successful abuse of process claim." Petitioners' best authority at the time was a decision from the Ninth Circuit, *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1263-1264 (CA9 1982), *cert. denied* 459 U.S. 1227 (1983).[20]

The record below includes two letters to the District Court from counsel for opposing parties: Pet. App. A102-104 and A105-107. The letter for petitioner dated March 1, 1987, cites a case from Seventh Circuit, *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (CA7 1982), made relevant to the controversy in this case by extensive analysis thereof on abuse of process and the *Noerr-Pennington* doctrine, in a dissent from *Westmac, Inc. v. Smith*, 797 F.2d 313, (CA6 1986) at 320-323, *cert. denied* 107 S.Ct. 885 (1987). Respondents' letter dated March 12, 1987 seems to have said that the District Court should not rely on a Sixth Circuit dissent because of the later Sixth Circuit decision in *Potters Medical*, and also because *Potters Medical* is in conflict with the Seventh Circuit and their decision in *Grip-Pak*.

Petitioners asked for *En banc* reconsideration based upon this Court's decisions in *Patrick* and *Allied Tube*, both *supra*, as narrowing and restricting judicially created immunity for anticompetitive conduct so that the *dissent* in *Westmac* should be adopted so that an abuse of process falls within the sham exception to the *Noerr-Pennington* doctrine defense: Question III, Pet. App. A63.

[20] Petitioners' further argument, *infra* page 29 speaks to *Clipper Exxpress* in the context of the scholarly writing, Bradley, L.D., 69 Cornell L. Rev. (Aug. 1984).

The dissent in *Westmac* argues, citing *Grip-Pak*—"The difference between abuse of process and malicious prosecution is that the former does not require proving that the lawsuit was brought without probable cause"—797 F.2d at 320. The dissent cites Dean Prosser, *Id.*, at 321, as did petitioners to the Court of Appeals: Pet. App. A96-97 and, as now do petitioners to this Court: Pet. App. A141-142. The dissent further cites The Restatement of Torts, *Id.*, also at 321.[21]

The facts when *Potters Medical, supra* was argued to the Court of Appeals involved competing health care facilities and alleged conspiracies including Social Security Act certification and Blue Cross participating hospital contracts. The facts underlying the dissent in *Westmac*—"*[T]he competitor would be driven out of the market by factors related to the litigation process itself—cost, delay, damage to reputation, decreased sales, etc.—long before any judgment in the action is rendered.*" *Id.*, at 322,—approximate the pleaded and discovery-corroborated actions of respondents deployed for monopolistic purpose in 1981 long before the petitioners' guilty pleas in January, 1984.

The Courts Below Were Wrong In Thinking That Any Degree Of Success On The Merits Of A State Court Prosecution For Felony Theft Of Trade Secrets Has Preclusive Effect Warranting Application Of The Noerr-Pennington Doctrine.

In January 1982, petitioner Smith was arraigned on a four count indictment including state trade secret felony theft law. On January 13, 1984, respondents obtained a guilty plea to a misdemeanor charge of receiving stolen property having a value less than $150.00.

Petitioners argued for Appeal No. 87-3657 *In Re Burlington Northern, Inc.*, 822 F.2d 518 (CA5 1987) *cert. denied* as *Union Pacific Railroad Co. v. Energy*

[21] *One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.* Restatement (Second) of Torts §682 (1977).

Transportation System, Inc., No. 87-705, _____ U.S. _____ (1988) (56 U.S.L.W. 3447). This citation was updated for the Court of Appeals just prior to oral argument: Pet. App. A82 and A99-100.

The apparent reasoning of the courts below conflicts with the *Burlington* decision from the Fifth Circuit.

> Our interpretation of the sham doctrine in *Coastal States* makes clear that success on the merits does not necessarily preclude an antitrust plaintiff from proving that the defendant's earlier litigation activities were sham. The determinative inquiry is not whether the suit was won or lost, but whether it was significantly motivated by a genuine desire for judicial relief. Of course, the success of the claim presented is persuasive evidence that the litigant in fact wanted the relief. It is highly unlikely that a party with a meritorious claim will not be significantly motivated by a desire to obtain relief on that claim. Thus, an antitrust plaintiff attempting to base liability on successful petitioning must overcome a strong inference that *Noerr-Pennington* applies and in many cases may be unable to do so. But reliance on the success of the earlier claim cannot substitute for proper consideration of any evidence the plaintiff might provide of the petitioner's motivation. *Id.*, at 528.

The degree of "success on the merits" question as a matter of federal law antitrust policy can be decided by this Court on the facts of this case.

The Courts Below Were Wrong In Not Expecting Or Requiring Testimonial Or Affidavit Evidence From Respondents Or Their Attorneys That Any Or All Of Them Were Acting In "Good Faith" When Seeking Out The Participation Of A State Prosecutor Or The Prosecutor's Office For Further Actions Of Anticompetitive Conduct Creating Monopoly Power.

The formal Complaint for this case was verified twice by petitioner Smith: Pet. App. A129 and A132. As the case proceeded in stages through the District Court

below, petitioner Smith filed sworn affidavits as to factual issues: Pet. App. A156-157 and A158-161. At no time since the filing in November, 1985, has any respondent submitted any sworn or attested affidavit or document of "good faith" drawn to affirm or deny factual issues raised by the Complaint involving respondents and their advisors vis-a-vis the state prosecutor or the prosecutor's office.

Duncan v. Peck, 844 F.2d 1261 (CA6 1988) was cited for the Court of Appeals just prior to oral argument: Pet. App. A83. *Duncan* was focused for rehearing *En Banc* by Question IV: Pet. App. A63-64, and by petitioners' assertion—"*Ends must not always justify means.*"—: Pet. App. A75.

The apparent reasoning of the panel may conflict with and disregard its very own new circuit precedent. Defendants in an antitrust case seeking immunity by summary judgment for anticompetitive conduct alleged to be conspiratorial and predatory, must have some or a minimal evidentiary burden. *Duncan* seems to require that respondents grant of summary judgment relief on the basis of a *Noerr-Pennington* immunity defense must have at the very least produced "affidavits in the District Court from him and his attorney stating that he acted solely on the advice of his attorney." *Id.,* at 1267-1268.

The use or nonuse of "good faith" affidavits to support a *Noerr-Pennington* immunity defense for facts including "resort to the courts" should be decided by this Court on the facts of this case.

The Court Of Appeals Below Was Wrong To Not Acknowledge The First Circuit Opinion In *CVD, Inc. v. Raytheon Co.* Which Set Forth An Antitrust Policy Dealing With Assertions Of Trade Secret Claims Against Competitors.

The case *CVD, Inc. v. Raytheon Co.,* 769 F.2d 842 (CA1 1985) was brought to the Court for review as *Raytheon Co. v. CVD, Inc.,* No. 85-1060, *cert. denied* in

February, 1986, 475 U.S. 1016. The impact of this case on antitrust law policy outside the First Circuit is evident from the ABA/Section of Litigation paper, Mannino, E.F., *Antitrust Remedies For A Former Employee Sued For Trade Secret Misappropriation:* Pet. App. A145, at A155.

The precedent value of *CVD, Inc.* even though from another circuit, was cited and argued to the Court of Appeals below just prior to oral argument—*Assertion of trade secret claim in bad faith is a predatory practice under antitrust laws*—: Pet. App. A82.

By petition for rehearing, *CVD, Inc.* was again cited as authority for the argument specific to petitioners' case—*When the state grand jury indicted, there were mere allegations of several crimes which can be shown at a plenary trial on the merits as having been capable of no reasonable proof. At trial, a false assertion by the Combustion Engineering defendants of trade secrets will be shown as yet another form of antitrust violation*—: Pet. App. A74.

The Court could determine the precedent value of *CVD, Inc.* on the facts of this case.

Both Courts Below Were Wrongly Influenced To Think That Antitrust Law Defendants With The Good Reputation And Business Stature Of Combustion Engineering, Inc., Would Never Indulge In Predatory Litigation In The Context Of Baseless Trade Secret Claims.

The problem for antitrust law policy set forth by the scholarly writing, *Note,* Smith, E., *Santa Clara L. Rev.,* Vol. 23, 1095 *et seq.* (1983) is framed by the title—*Eliminating Predatory Litigation In the Context of Baseless Trade Secret Claims: The Need For A More Aggressive Counter Attack.*

In the *Note,* Part I, *Introduction*—Abuse of the judicial process is hardly a novel problem, yet its impact in the area of trade secret litigation uncovers particularly

fascinating and unsettled issues. Consider, for example, the following hypothetical situation . . . The employer . . . [in] its evaluation of the trade secret claim and the loss it will suffer at the hands of the departing employees is often colored by emotion . . . litigation instigated by the former employer can be used as an anticompetitive tool. Established companies some times pursue a baseless trade secret claim for the purpose of harassing or eliminating an incipient competitor. The new company is forced to utilize its limited capital and manpower to fend off the baseless lawsuit. . . . *Id.*, at 1095-1096.

The *Note* continues: The element of improper purpose requires the trade secret defendant to show coercion on the part of the trade secret plaintiffs in order to obtain a collateral advantage . . ., there may be an *actionable abuse of process where it can be shown that the plaintiff filed the trade secret claim in order to coerce the defendant into entering certain business arrangements with it.*[22] *Id.*, at 1114-1115.

Petitioners chose for federal court jurisdiction the antitrust remedy, discussed by the *Note* author beginning at 1116. Petitioners were met in both courts below by an "emergence of the *Noerr-Pennington* Doctrine", *Id.*, at 1118. Neither court below thought compelled to accept the sham exception to *Noerr*, which "illustrates the judiciary's recognition of the potential anticompetitive effects of baseless lawsuits." *Id.*, at 1119; for the sole and decisive reason, the pleas of guilty by petitioner Smith on January 13, 1984.

The *Note* author did not have reported, in 1983, a business tort case such as now sent out from Sixth Circuit to students of antitrust law policy by *CCH Tr. Reg. Rep.* ¶¶68, 224.

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[22] Point for petitioners' case: Respondent Kelly obtained by the plea bargain arrangement a noncompetitive covenant for an additional three years. Complaint ¶75: Pet. App. A126.

The Court Of Appeals Was Not Correct In Its Citation And Application Of *United Airlines v. Evans*, 431 U.S. 553 (1977).

Based on newly discovered evidence, petitioners sought and were eventually granted leave to file an amendment adding Complaint ¶¶78-80, and a later date for cause of action accrual, January 13, 1984. The amendments were based on facts shown by letters subpoenaed from the office files of Niam Investigations, Complaint ¶24: Pet. App. A113. Several of these letters are printed in the Appendix herefor: Pet. App. A162-173. These letters, particularly plaintiffs' Exhibit 2, a letter from Niam to respondent Kelly dated January 27, 1984, describe a *Kafkaesque* experience for petitioner Smith, with only dark at the end of the tunnel.

Petitioners argued to the Court of Appeals in the context of *Noerr-Pennington* and the SECOND and THIRD COUNTS—*Long before the guilty pleas were entered plaintiff Smith suffered loss of employment and income, paid expensive attorneys fees, was the subject of public disgrace and humiliation, and was burdened by the psychological trauma of over two years of uncertainties*: Pet. App. A74.

Petitioners' Question V in the suggestion for rehearing as to the *FIRST COUNT*, Pet. App. A64, asked whether the Panel has failed to understand the factual base, as evidenced by Exhibit 2, for the "present effect and therefore continuing violation" alleged in Complaint ¶¶78-80.

The District Court never wrote directly to the question of the amended Complaint and the cause of action accrual date January 13, 1984 as legal issues. The District Court did write —*The Court concludes that plaintiffs are essentially asking the Court to set aside their guilty pleas, something which the Court has no power to do. The plaintiffs instead must pursue such relief through post-conviction procedures in the state court system*: Pet. App. A36, Order filed March 24, 1987.

Two months later, on May 18, 1987, the state court did the only thing it could do "to set aside their [petitioners'] guilty pleas", the state court ordered the record of conviction based on the misdemeanor guilty plea of petitioner Smith expunged.[23]

Argument As To Subsidiary Questions Arising From The Third Appeal Taken By Petitioners To The Court Of Appeals.

Petitioners filed the notice of appeal August 5, 1987, which became the third matter for petitioners in the Court of Appeals, Appeal No. 87-3761. This third appeal was taken from an order of the District Court filed July 24, 1987: Pet. App. A43-45.

By this appealed order, the District Court agreed with reasoning presented by counsel for the Combustion Engineering respondents—The Ohio expungement law "was not intended to be used by an offender as a sword to retaliate against the individuals who brought him to justice." Pet. App. A44.

The fallacy of this logic was argued at length for petitioners by the blue cover *and* grey cover briefs for appellants in Appeal No. 87-3761. The petitioners presented two questions, broad and specific. *First,* whether full faith and credit and the state court judgment of expungement have an effect on earlier judgments of the District Court. *Second,* whether the order of July 24, 1987, went against the Constitution, Article 4, Section 1, and federal statutes and the Ohio expungement statute, or the Rules of Evidence: Cf.,: Pet. App. A79.

The broad and specific undecided questions in Appeal No. 87-3761—based on facts of the case showing an established firm using state trade secret felony theft law to prosecute in state court a former employee and his fledgling firm, two years later a coerced misdemeanor guilty plea with restitution and parole, and still later, during federal court counterattack by the former employee and his fledgling firm, the state court expunges

[23] The Ohio law on "expungement" applies only to natural persons and does not apply to businesses such as corporations.

the record based on the allegedly coerced guilty plea—could arise again in other business tort cases, and should be settled by this Court.

The Courts Below May Have Been Influenced Or Biased In Favor Of Respondents By An "Antitrust Policy To Take Account Only Of Efficiency Concerns."

Professor Hovenkamp[24] published an article, 84 Mich L. Rev. 213 (1985), *Antitrust Policy After Chicago,* summarized by the law review editor as arguing "that even if it were appropriate for antitrust policy to take account only of efficiency concerns, the Chicago School's neoclassical efficiency model is not sophisticated enough to account for real world behavior."

The anticompetitive conduct of respondents against petitioners was "efficient". Dollar amounts in evidence in the District Court can project to a high benefit/cost ratio. Petitioners assert that respondents did not meet their emerging competition in the market by offering equivalent products to mutual customers at an equal or lower cost with equal or better delivery. Rather, as the Court of Appeals has said, respondents "resorted to the courts"; Pet. App. A7.

The record below, available to the Court pursuant to Supreme Court Rule 19, includes a deposition transcript for testimony of respondent Kavanagh taken May 20, 1986. At Tr. 81, Kavanagh begins his testimony about a discovered document, plaintiffs' Exhibit 20-3,[25] and confirms his handwriting showing the following amounts: For "Investigation" of petitioners, "Total Expenses" as of "10-26-83" of only $97,152.85. This total included: for Arter & Hadden legal assistance, §14,934.25; and for private investigator Niam, $77,735.07. Petitioners assert that the predatory litigation produced an incredibly high and efficient benefit/cost ratio: X X X sales ÷ $97,152.85 out-of-pocket expenses.

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[24] The stature of Professor Hovenkamp (now at University of Iowa, College of Law, Iowa City, Iowa), has been recognized by the Court by citation of *P. Areeda & H. Hovenkamp, Antitrust Law, Allied Tube Corp. v. Indian Head, supra,* footnote 10, and elsewhere in that case.

[25] Exhibit 20-3 is an internal document from the files of respondent C-E Cast Equipment, of the type referenced in footnote 13, *supra.*

The Writings of Scholar Authors Attest to Public Importance of Questions Presented by this Case.

(A) Meyer, D.L., *A Standard for Tailoring Noerr-Pennington Immunity More Closely to the First Amendment Mandate,* 95 Yale Law Journal 832 (1986).

This *Note* proposes that immunity not be granted when a group's petitioning produces unnecessary direct antitrust injury *and* the governmental action sought by the group is illegitimate. Such a rule would deter undesirable direct injury and would force groups to consider less injurious alternatives when petitioning for anticompetitive results. *Id.*, at 832.

The courts below relied only on the late pleaded *Noerr-Pennington* doctrine to provide immunity from antitrust suit for all respondents, including Hubbell, the product supplier to petitioners who never took one step toward a county prosecutor or a state court. The courts below did not make any effort to recognize the "sham exception" other than to hold that the exception did not apply because petitioners pled guilty. To paraphrase the *Note* author Meyer, *Id.*, at 856, the courts below failed to take into account the inevitability of direct injury inflicted by respondents and the illegitimacy of state court criminal prosecution sought by collusive petitioning activities, and have therefore tolerated a dangerous amount of injurious conduct.

Consistent with the theorem of the *Note* author, petitioners suggest that the facts of this case could support a modification to the *Noerr-Pennington* doctrine—

> **No antitrust claim by a former employee and founder of a fledgling firm can be barred using the Noerr-Pennington doctrine when a causal connection exists between the antitrust violation and the harm to the former employee and the fledgling firm, and the harm was intended by the established firm.**

(B) Bradley, L.D., 69 Cornell Law Review 1305, (1984), wrote a *Note* for the topic *Noerr-Pennington Immunity From Antitrust Liability Under Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception With A Constitutional Analysis.*

In the courts below, petitioners matched up *Clipper Exxpress* (Ninth Circuit) against *Potters Medical* (Sixth Circuit).

A later decision from Ninth Circuit was cited and argued to the Court of Appeals just prior to oral argument, *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc., et al.*, 827 F.2d 458 (CA9 1987): Pet. App. A84 and A100. *Sessions* is a *Noerr-Pennington* case involving a model fire code for underground gas storage tanks. *Sessions* cites *Clipper Exxpress* as circuit precedent for three points: (1) The crucial question, as we see it, is whether these asserted improprieties amounted to an "abuse of process", *Id.*, at 465; (2) Antitrust immunity under *Noerr-Pennington* does not extend to private parties who have entered into a "conspiracy" with governmental actors. *Id.*, at 466; and (3) An antitrust plaintiff cannot summon the "sham" exception by alleging that defendant made misrepresentations when pursuing *legislative as opposed to adjudicative—action, Id.*, at 467 (emphasis added).

The facts of petitioners' case reach the same questions decided by the *Clipper Exxpress* and *Sessions* analysis. The facts, however, go beyond these Ninth Circuit decisions because the "adjudicative action" was not merely a civil action in state or federal court, but was a state court prosecution under state trade secret felony theft law.

These questions should be settled by this Court on the facts of this case.[26]

[26] Petitioners' letter of July 1, 1988 advised the panel of the Court of Appeals that both sides in *Sessions* had sought review by the Supreme Court of the Ninth Circuit opinion. Petitioners' counsel

(Footnote continued on following page.)

CONCLUSION

Petitioner Smith comes to seek review by this Court of record, but not trial, facts construed by both federal courts below as inadequate to sustain a plea for relief. The respondents must still stand in awe since their business activities were helped and immunized by the courts below: First in state court where they were the moving parties; Second, in federal court where they were the winning parties. The facts in the Complaint, corroborated by pretrial discovery as to motive, intent and business purpose of respondents, are those which demonstrate conduct used for efficient destruction of business competition. The maxim amongst respondents may be "Whatever is good for Combustion Engineering is good for the Country." But, the facts of this case provide this Court with opportunity to stand the Constitution, the civil rights laws and the Sherman Act up against success and accomplishment of a business purpose. For these reasons, this Court could acknowledge that there are public questions of exceptional importance awaiting review by grant of this petition for writ of certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

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(Footnote continued from preceding page.)
predicted to the Sixth Circuit how this Court might decide; concluding with the sentence—Either way, the result of Supreme Court action will favor plaintiffs' appeal,—: Pet. App. A100-101. The way it turned out, on June 27, 1988 the Court granted both petitions, vacated the Ninth Circuit judgment, and remanded for further consideration in light of *Allied Tube*. See _____ U.S. _____, 108 S.Ct. 2862, 101 L.Ed.2d 899.